IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

SECOND APPEAL NO.324 OF 2004
WITH
CIVIL APPLICATION NO.1128 OF 2004

Shankar Yashwant Gurav & Anr. .. Appellants.
Vs.
Rukmini Krishna Gurav & Anr. .. Respondents.

Mr.R.N.Kachare for the appellants.
Mr.H.S.Venegaonkar for the respondents.

CORAM : D.B.BHOSALE, J.
DATED : 12TH SEPTEMBER, 2007.

P.C.:

. Heard learned counsel for the parties.

2. This second appeal is directed against the judgments of the courts below by which a suit filed by the respondents-plaintiffs for partition and separate possession of their 1/3rd share in the suit properties and for declaration that the Will deed executed by their father in favour of defendant no.2 is false, fabricated and not binding on their share in the suit property, stands decreed.

3. Mr.Kachare, learned counsel for the appellants assailed the judgments of the courts below on two grounds. Firstly, he submitted that the defendants had proved the exeuction of Will by

deceased - Hanmant dated 25.6.1987 by examining the scribe and attesting witness etc. and the courts below have failed to appreciate the evidence adduced by them in proper perspective and have wrongly held that the Will has not been proved. Secondly, he submitted that the properties at serial Nos.11 to 19 are the properties of trust and no permission as contemplated by section 51 of the Bombay Public Trust Act, 1950 was sought before filing of the suit.

4. I perused the judgments of the courts below. Both the courts have appreciated not only the evidence of the witnesses examined by the parties but have also taken into consideration the surrounding circumstances and recorded a categoric finding that the alleged Will has not been proved by the defendants. Merely because scribe and attesting witnesses were examined and they deposed in favour of executor of the Will that by itself is not sufficient to hold that the Will stands proved. The courts below have considered the evidence adduced by the parties in proper perspective and have rightly held that the defendants could not prove that they have succeeded the suit property by the Will executed by the deceased Hanmant in favour of defendant no.1, with whom his relations were not cordial. Moreover, the plaintiffs are the daughters of Hanmant and it

was found that there was no reason why Hanmant should execute the Will in favour of the defendants. It further appears that the plaintiffs have produced on record a deed at Exhibit-105 to show that the deceased Hanmant had not executed any Will in his life time. This deed at Exhibit-105 was produced by the plaintiff only for colateral purpose to rebute the Will in question. The findings recorded by the courts below, in my opinion, are based on the evidence on record. Insofar as the second contention is concerned admittedly there is no decree for partition in respect of the trust properties. That apart, such contention was not raised either before the trial Court or before the appellate court. In the circumstances I find no reason to interfere with the concurrent findings recorded by the courts below as I find sufficient material on record to sustain those findings. No substantial question of law is either involved or raised in the appeal.

5. At this stage Mr.Kachare, learned counsel for the appellant submitted that the suit itself was not maintainable in view of a specific bar under section 23 of Hindu Succession Act, 1956. Such contention was also not raised either before the trial Court or before the appellate court. In other words the decree was not challenged by the defendants either

before the first appellate court or before this court on the ground that the plaintiff could not have sought partition in respect of the dwelling house. In the circumstances this submission of Mr.Kachare also stands rejected. The second appeal, accordingly, stands dismissed. Consequently, civil application is also disposed of.

(D.B.BHOSALE, J.)